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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-924

SEARS, ROEBUCK & CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY,

Petitioners,

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

The issues posed in the four *Solien* cases currently pending before this Court [1] raise important questions in the administration of the National Labor Relations Act, in the quest for procedural fairness and in the solution of the practical problems resulting from the absence of this Court's definition of the rights which flow to charging parties under the Act.

Despite the significance of these matters, the National Labor Relations Board, by its General Counsel, has militantly resisted all efforts to obtain any resolution or clarification from this Court. In *Solien I* and *Solien II*, this resistance has taken the form of opposing the granting of certiorari on the ground that the vehicles were "inappropriate", notwithstanding the fact that the issues are recurring ones which will continue to plague those whose vital interests require that they be aware of the nature and limits of their statutory rights. In the instant case, the Board's resistance consists of a failure to give due regard to the breadth of the problems involved, coupled with a misleading statement of the issues to be resolved, the facts of the dispute and the contentions urged by Petitioners.

A. THE ISSUES

The Board's framing of the issues seems designed to render this case inconsequential, hence unworthy of this Court's attention. To the Board, the question presented is whether Petitioners have exhausted their administrative remedies or, as a corollary, whether the Board's rules permit administrative review of the General Counsel's acceptance of a unilateral settlement agreement.

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[1] *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440 F.2d 124 (CA 8 1971), petition for rehearing pending. (No. 1588; *Solien I*); *Terminal Freight Handling Co., et al.* v. *Solien*, 444 F.2d 699 (CA 8 1971) (No. 71-609; *Solien II*); *Sears, Roebuck & Co., et al.* v. *Solien*, 450 F.2d 333 (CA 8 1971) (No. 71-924; *Solien III*); *Terminal Freight Cooperative Assn., et al.* v. *Solien*, 447 F.2d 1099 (CA 8 1971) (No. 71-925; *Solien IV*).

(Opp., pp. 2, 4). Contrary to such a formulation, however, the fundamental questions presented are whether the General Counsel may permissibly exclude the charging party from meaningful participation in the settlement of notorious unfair labor practice charges, in view of the "party" status which the Act accords to such charging parties, and whether the *procedures* utilized by the Board in its settlement efforts are in fact reviewable. If such procedures are not reviewable, falling within the ambit of the unreviewable discretion conferred on the General Counsel by Section 3(d) of the Act, then there are obviously no further remedies to exhaust.

The Board's formulation of the issues, therefore, has two principal flaws. First, by asking whether "exhaustion" has occurred, instead of whether it is statutorily required or permitted, the Board has assumed the conclusion which it desires the Court to reach. Second, the Board has merged what are really separate questions. There is a difference between the *merits* of a settlement secured by the Board and the *procedures* utilized in this negotiation. The Board's assertion of the reviewability of "settlements" is wholly accurate only to the extent that this refers to the merits of remedial provisions incorporated in the agreement. However, the methods by which such agreements are secured constitute part of the prosecutorial function of the General Counsel and, as such, would fall within the delegation of unreviewable discretion in Section 3(d) which, according to Congress, would "effect a separation of the prosecuting and adjudicating functions within the Board". (*Frito Company* v. *NLRB*, 330 F.2d 458, 462 (CA 9 1964).

Therefore, contrary to the Board's efforts to characterize this case as one involving only the factual question as to whether there has been exhaustion of administrative remedies in a reviewable dispute, the case presents

for this Court's consideration questions concerning the meaning of Section 3(d) of the Act, the reviewability of protested administrative procedures in the attempted settlement of the merits of cases, and the extent to which charging parties before the Board, given their status as "parties" and their vital interests in the proceedings, have a right to an informed participation in the settlement process itself.

B. THE FACTS

In addition to misstating the breadth of the issues presented, the Board's Opposition also misstated various facts. The Board's assertion (at p. 6) that Petitioners did not seek to review the Regional Director's refusal to permit their participation in the settlement process is incorrect. In fact, such protests were made to the Regional Director on July 14, August 12, and again on October 6, 1970. Upon the Director's rejection of these appeals, further review was sought from the General Counsel's office on July 17, 1970 and again on February 18, 1971. These appeals, too, were denied. The matter did not thereafter receive the Board's attention, since on November 22, 1971, the Board determined to defer its consideration of any aspect of the case because the General Counsel had agreed to reconsider his prior approval of the settlement agreement.

For purposes of clarity, however, it must be noted that this reconsideration by the General Counsel relates only to the merits of the settlement, not the procedures which were adopted to achieve it; similarly, the question which had been before the Board, prior to its deferral, related also to the merits of the substantive remedial provisions of that agreement. No decision of the Board has indicated that it would or could assert jurisdiction over the matter of the General Counsel's pre-settlement procedures. The assertion by the General Counsel in this case that the Board would do so is an assumption predi-

cated upon the disputed interpretation of Section 3(d) of the Act. Suffice it to say that review of the Regional Director's pre-settlement conduct was taken at least twice to the General Counsel, constituting, in Petitioners' view of the meaning of the separation of functions effected by 3(d), an exhaustion of the available administrative remedies.[2]

C. THE PARTIES' CONTENTION

In support of the participatory role sought by Petitioners, we have argued that charging parties' right to frame objections to proposed settlement agreements becomes meaningful only to the extent that they possess adequate information to enable them to make an intelligent and knowledgeable evaluation of the terms of that agreement. While some information would normally be available to the aggrieved party in a labor dispute, other pertinent data is uncoverable only by the Board's agents pursuant to their bilateral investigation of the charges filed. A charging party's right to protest a settlement's terms as being inadequate to cure the wrongs committed must, therefore, include the right to be informed about all the collected data which is material to such a judgment—hence, information discovered by the Board's agents which could not otherwise be known to the aggrieved charging parties.

In opposing the charging parties' right to such an informed participation in the resolution of cases involving their vital interests, the General Counsel misstates both what Petitioners sought from the Regional Director in this case and what we believe should be afforded

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[2] The matters now pending before the General Counsel, since they involve the merits of Petitioners' substantive objections to the settlement agreement, are not involved in this case. It should be pointed out, however, that the unresolved posture of this case—and all the *Solien* cases since they arose out of the same labor dispute—lends particular impetus to the need to resolve the important questions presented to this Court for review.

generally. Contrary to the General Counsel's characterizations (at p. 6) that we "demanded" that the Regional Director make available "all evidence relating to the unfair labor practice charges, including the affidavits of prospective Board witnesses . . .", a much narrower request was formulated which gave consideration to the Director's desire to preserve the confidentiality of his files and the identity of prospective witnesses. Indeed, on at least two previous occasions, Petitioners herein presented a formulation of the extent and kind of information required of the Director which varies considerably from the above-described characterization. For example, the following language appears both in Petitioners' brief to the Eighth Circuit in *Solien IV* as well as in the Petition for Writ of Certiorari in *Solien IV* (No. 71-925):

> "Such a requirement does not presuppose an effort to discover inter-agency memoranda or other internal deliberations nor to examine the affidavits of any prospective witnesses nor even to be informed as to the identity of any such witnesses. Rather, the information which is needed to make the right to object meaningful consists only of (i) the evidentiary facts uncovered by the Director's investigation which support his belief that the law was violated, many of which facts could not otherwise be known by charging parties; (ii) those facts which were alleged by the charging parties which the Director does not believe to be true or relevant or verifiable; (iii) the theories upon which the Director proceeds; (iv) the relief which the Director seeks, as well as his reasons for refusing to seek other relief which the charging parties may have urged."

Fundamentally, the Director and the General Counsel seem to take the view that the method by which settlements are negotiated, both with respect to providing information to the charging parties and permitting them

to participate in the deliberations, is within the agency's discretion; that this question includes the right to provide no information and exclude charging parties' participation in negotiations, permitting them only to file objections to the settlement agreement ultimately negotiated between the Director and the respondent. The charging parties may then, if they are displeased with the agreement, seek review in the courts.

This construct contains several major deficiencies. *First*, there is the question, discussed *supra*, as to whether the General Counsel's pre-settlement procedural decisions are reviewable at all under Section 3(d). *Second*, the lack of all material facts bearing on the merits of the settlement would prevent charging parties from framing adequate objections or knowing precisely what issues to frame for the courts on review or what relief would be appropriate given those facts. *Third*, since the interests of the Board and the charging parties are not identical (see, *e.g.*, *U.A.W.* v. *Scofield*, 382 U.S. 205), the exclusion of charging parties from settlement negotiations is inherently unlikely to produce a result satisfactory to their needs. Nor is it compatible with charging parties' status as aggrieved "parties" before the agency to diminish their role so as to render them only the beneficiaries of others' deliberations rather than active and vitally interested participants on their own behalf. *Fourth*, there is a substantial question as to the extent to which meaningful review is available to charging parties even on the merits of the settlement agreement itself. For example, according to *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (CA 3 1966), charging parties are entitled to a full evidentiary hearing on their objections to settlements. However, in *Concrete Materials of Georgia, Inc.* v. *NLRB*, —— F.2d ——, 76 LRRM 2832 (CA 5 1971), the right to such a hearing is limited only to objections raising "material issues of

disputed fact".[3] But in *Local 282 I.B.T.* v. *NLRB*, 339 F.2d 795 (CA 2 1964) it was held that charging parties are not entitled to any evidentiary hearing on their objections to the General Counsel's approval of a settlement agreement. Under such circumstances, denial to charging parties of an active participatory role in the settlement negotiations may result in the effective denial of a voice in the outcome of their meritorious charges. *Fifth*, where judicial review of the General Counsel's decision is sought, the question before the court would presumably be whether the settlement is reasonable. Since a number of alternative settlements may all be judicially sustainable despite varying considerably in their desirability to charging parties, failure to permit those charging parties to participate in the negotiation process leading to the selection of one of those alternatives may needlessly prevent them from achieving the most desirable and effective result. And *sixth*, statistical research has revealed that charging parties before the Board have no reason to be sanguine as to the likelihood of favorable consideration of their objections to settlements by the General Counsel—whether the settlements are formal or informal. (See, Footnote 19, p. 13 of Petition for Writ of Certiorari herein). That fact, together with a denial of an evidentiary hearing on the objections and the limited value of judicial review in these cases, again argues persuasively for permitting charging parties the greatest opportunity for informed involvement in the negotiation and selection of settlement agreements in their cases.

Finally, Petitioners wish to direct the Court's attention to an inconsistency in the General Counsel's approach to the question of the reviewability of his deci-

[3] Absent the right to all material facts, including those secured by the Director's investigation, but unknown to the charging parties, it is difficult to see how this qualified right of review could be utilized effectively by the charging parties.

sions in cases involving his approval of unilateral settlement agreements. In this case he argues that his "prosecutorial" conduct, *i.e.*, the procedure he follows in securing settlement agreements, is reviewable before the Board and the courts despite the proscriptions of Section 3(d). Yet, in another case now pending in the Third Circuit, *Terminal Freight Cooperative Association, et al.* v. *NLRB* (CA 3, No. 18,948), the General Counsel argues that the *substantive terms* of a settlement agreement which he approved may *not* be reviewed because such approval was part of the prosecutorial function reserved to his discretion under 3(d). Although the cases differ, insofar as here the General Counsel issued an administrative complaint prior to settlement, while in the Third Circuit case he had not, that distinction would appear to have nothing to do with the question as to whether certain specific conduct represents a "prosecutorial" function.

The effective administration of the National Labor Relations Act and these and all other charging parties before the Board require judicial guidelines as to the

meaning of Section 3(d) as well as the resolution of the related questions prsented here.

Respectfully submitted,

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